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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 428 428

THE UNITED STATES OF AMERICA,
Appellant,

vs.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SEPARATE BRIEF FOR APPELLEES NATIONAL ASSOCIATION OF REAL ESTATE BOARDS AND HERBERT U. NELSON.

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February 3, 1950.

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OPINION BELOW

The opinion of the United States District Court for the District of Columbia (R. 437) is reported in 84 F. Supp. 863.

JURISDICTION

The final judgment of the District Court was entered on July 29, 1949 (R. 436). The petition for appeal was filed and allowed on September 23, 1949 (R. 440-441). The jurisdiction of this Court is conferred by Section 2 of the

Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. Probable jurisdiction was noted on November 21, 1949 (R. 629).

QUESTIONS PRESENTED

The principal question presented by this appeal, from the point of view of these Appellees is not mentioned in Appellant's statement of the questions presented. That question, to which this separate brief on behalf of Appellees National Association of Real Estate Boards and Herbert U. Nelson is directed, is whether the Trial Court's Finding of Fact No. 20 is *clearly erroneous*. That finding states that:

> "Neither the Defendant National Association of Real Estate Boards nor the Defendant Herbert U. Nelson conspired with the Washington Real Estate Board, to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia."

Unless that finding is clearly erroneous, the judgment must be affirmed with respect to the Appellees National Association of Real Estate Boards and Herbert U. Nelson, hereafter sometimes referred to as "NAREB", irrespective of what disposition this Court makes of the questions discussed in the joint brief of all Appellees.

COUNTER-STATEMENT OF THE CASE

The statement of the case in Appellant's brief requires, for the purpose of the question discussed in this separate brief, the following observations and corrections:

It might be more accurately stated that the complaint charged Appellees with engaging in a combination and conspiracy in violation of Section 3 of the Sherman Act

to restrain the trade and commerce of the District of Columbia in the sale, exchange, lease and management of real property and the improvements thereon (R. 367) rather than one to fix commission rates to be charged by members of the Washington Board for their services, as Appellant suggests at page 3 of its brief. The significance of this error of the Appellant in interpreting the meaning of the complaint is discussed in the joint brief of Appellees.

The District Court on July 29, 1949, filed the following findings of fact with respect to Appellees, National Association of Real Estate Boards and Herbert U. Nelson (R. 434):

> "18. The Defendant National Association of Real Estate Boards is a nation-wide, incorporated, trade association of which the Washington Real Estate Board is a member. Active members of the Washington Real Estate Board are likewise members of the National Association.
>
> "19. Defendant Herbert U. Nelson is the Executive Vice-President of the National Association of Real Estate Boards.
>
> "20. Neither the Defendant National Association of Real Estate Boards nor the Defendant Herbert U. Nelson conspired with the Washington Real Estate Board, to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia."

The section of Appellant's statement of the case entitled "The Participation of the National Association and Herbert U. Nelson in the Activities of the Washington Board" is factually incomplete. It includes references to but a part of the evidence material to the question raised by this separate brief. In many instances quotations from documents are taken out of context. Other important

evidence is omitted. Exception is taken to this portion of the statement of the case of Appellant. Inasmuch as this separate brief is essentially a discussion of the evidence which supports the above quoted findings of the District Court, a duplicate statement of that evidence will not be incorporated into this counter-statement of the case, but will be pointed out and discussed in the argument.

ARGUMENT

Introduction

The Appellant has characterized the complaint as charging Appellees "with engaging in a combination and conspiracy in violation of Section 3 of the Sherman Act to fix the commission rates to be charged by the members of the Washington Board for their services when acting as brokers in the sale, exchange, lease and management of real property in the District of Columbia."[1] In its Finding of Fact No. 20, the District Court found that, "Neither the Defendant National Association of Real Estate Boards nor the Defendant Herbert U. Nelson conspired with the Washington Real Estate Board, to fix and prescribe the rates and commission to be charged by members of the latter nor to raise rates of commission in the District of Columbia." Unless this finding of fact be set aside this Court will affirm the decision below with respect to Appellees National Association of Real Estate Boards and Herbert U. Nelson, irrespective of what disposition is made with respect to the other Appellees.

[1] Appellant's brief, p. 3. For the purposes of this argument this characterization of the complaint will be taken as correct, inasmuch as that is the most favorable interpretation of the complaint for the Appellant and, as is discussed in the joint brief of all Appellees, the Appellant cannot prevail in any event unless this Court adopts its characterization of the complaint, as it must be conceded that there is no evidence of any restraint in the sale or exchange of real property to be found anywhere in the record.

In suits in equity brought by the United States under the Sherman Act, whether a finding of fact shall be set aside by this Court is governed by Federal Rule of Civil Procedure 52; *United States* v. *Yellow Cab Company*, 94 L. Ed. (Adv.) 123, (U. S. 1949). The applicable provisions of Federal Rule of Civil Procedure 52 are:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses."

In *United States* v. *Yellow Cab Company*, *supra*, 94 L. Ed. (Adv.) at 126, this Court stated:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those of other litigants. There is no exception which permits it, even in an anti-trust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight is not 'clearly erroneous'."

As in the *Yellow Cab* Case, *supra*, the crux of this case with respect to NAREB was intent and purpose. At the conclusion of the trial, counsel for Appellant stated to the trial court (R. 304):

> "In conclusion, if your Honor please, I want to say once more with the exception of the intent and purpose of the Committee on Rates, Rules and Customs [of NAREB], with that exception I don't think that Brother

> Whiteford [counsel for NAREB] and I have any dispute about the facts in this case."

A review of all the evidence with respect to NAREB will reveal that, as in the *Yellow Cab* Case, *supra*, intent, motive and design are deciding factors. The Government again is asking that this Court try the case *de novo* on the record and reject the findings of the trial court.

The burden is, therefore, upon the Appellant to show that Finding of Fact No. 20 is clearly erroneous. This, Appellant has attempted to do in its brief in two major ways. First, by the contention that that finding does not mean what it says, and, secondly, by a discussion of the evidence which Appellant contends would lead a court to a contrary finding. The first contention is twofold. Appellant asserts that the trial court in a colloquy with counsel indicated that it felt that NAREB encouraged or incited the Washington Board to do the things which the Washington Board did. This, Appellant suggests, supports its second theory that Finding of Fact No. 20 is merely another way of stating that the activities of the Washington Board were legal (Appellant's brief, pp. 42-43). Neither of the two aspects of this argument are sound.

On page 37 of its brief Appellant quotes part of a sentence from a colloquy by the trial court to the effect that "Whatever the Washington Board did, the National encouraged or incited the Washington Board to do" (R. 341). The full paragraph from which the excerpt was quoted is set forth in footnote 11 on page 22 of Appellant's brief. That full paragraph indicates that what the Court was doing was asking counsel for NAREB whether such a statement of fact was the case. The most important part of such a colloquy is, therefore, that counsel's reply, and any further pertinent remarks of the Court, which were as follows (R. 341):

"Mr. WHITEFORD: No, sir. I make this distinction: That your Honor could hold that price-fixing for personal services by the local brokers in Washington could be illegal and could be a combination in restraint of trade, to which the NAREB would not be a party.

"The COURT: Even though the National Board encouraged the Washington Board to do what the Washington Board did?

"Mr. WHITEFORD: No, sir. I say we do not claim to have encouraged it at all."

Taken out of its full context, therefore, the excerpt from the trial court's remarks quoted on page 37 of the Appellant's brief is very misleading; in its context it turns out to be no "suggestion" at all. Reliance upon it can only emphasize the weakness of Appellant's case upon the evidence.

The suggestion on pages 42 and 43 of Appellant's brief that Finding of Fact No. 20 was merely a re-statement of a legal conclusion that what the Washington Board was doing was not a violation of law depended partially upon this misinterpretation of the excerpt from the trial court's colloquy on page 37 of that brief, and, therefore, almost falls of its own weight. Also, it converts a finding of fact into a conclusion of law. That the contention is untenable is likewise indicated by the wording of Finding of Fact No. 20, itself. That finding does not state, as Appellant would urge this Court to construe it, that the Appellees National Association of Real Estate Boards and Herbert U. Nelson did not conspire to violate Section 3 of the Sherman Act. It is a truly factual statement that they did not conspire with the other Appellees to "fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia" (R. 434). It is Appellant's contention that those were the *acts* which

violated Section 3 of the Sherman Act. The finding clearly says these Appellees did not conspire to do these acts.

Finding of Fact No. 20 is, moreover, a useless duplication if it is merely a re-statement that the Washington Board was not violating the Sherman Act. In discussing what findings to make, the Court made it clear that it would not stop with findings that the Washington Board and its members had not violated the Sherman Act, although that would dispose of the entire case, but would make additional findings with respect to the National Association (R. 352). Findings 18, 19 and 20 were, thereupon, made by the Court (R. 352-354, 434).

There is, therefore, no escape for Appellant from its burden of showing that Finding of Fact No. 20 is clearly erroneous. Appellant on page 41 of its brief contends:

> "In sum, the National Association and Appellee Nelson are shown by this record to have encouraged the rate-setting activities of the Washington Board (1) by requiring the members of the National Association in the District of Columbia as a condition of membership to agree that the rates established by the Washington Board should be observed, and (2) by giving detailed assistance to the Washington Board in formulating the rates which it prescribes."

A detailed study of the evidence with respect to these two points does not establish that Finding of Fact No. 20 is clearly erroneous, but rather indicates that such a finding is not only amply supported by the evidence, but is compelled by it.

Code of Ethics

Appellant says (Br. p. 40) "We submit that the Government is entitled to judgment against the National Association on the basis of its *by-laws and Code of Ethics alone.*"

During the trial it was said (R. 173):

"You are alleging that the National Council, or the National Board, and the Local Board entered into a conspiracy. That's a pretty definite thing.

"Mr. KRAMER: No doubt about that.

"The COURT: It is a very definite thing.

"Now you have produced evidence to show what action the National Board took and the Local Board, but there has got to be some coming together somewhere, hasn't there?

"Mr. KRAMER: I am suggesting to your Honor that the coming together is by the agreement of each member of the Washington Board who is a member of the National Association, to be bound by the Code of Ethics of the National Association."

This argument of the Government is based upon the syllogism that among the 35 articles in the Code of Ethics of the National Association (Exhibit 6, R. 481-486) there is one article, No. 9, which states, "the schedules of fees established by the various Real Estate Boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor," while the by-laws of the National Association contained an Article III which states:

"CODE OF ETHICS

"Section 1. Each member Board shall adopt the Code of Ethics of the National Association as a part of its rules and regulations for violation of which disciplinary action may be taken.

"Sec. 2. Any member Board which shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its constituent members may, after due notice and opportunity for hearing, be expelled from membership in the National Association by the Board of Directors" (R. 502-503).

From this the Appellant claims, *quod erat demonstrandum*, that the National Board has agreed with the Washington

Board and its members to fix rates in the District of Columbia.

The Government would analogize this involved reasoning to the by-laws of the Associated Press, which provided some of the evidence to support the trial court's findings in favor of the Government which were affirmed by this Court in *Associated Press* v. *United States*, 326 U. S. 1 (1945). In that case the provisions of the by-laws relied on by the Government were clear. See 326 U. S. at 10-11 and especially footnote 6. There was no involved reasoning necessary, no question of ethics or what *should* be done to be *ethical*, but rather what *must* be done to become a member of the Associated Press, and what was in fact done. There was no strained interpretation necessary as to the meaning of those by-laws.

It should also be remembered that the business of substantially all members of the Associated Press was interstate commerce and so was clearly under the Sherman Act, while about 99 out of every 100 National Association members, that is members of local boards in the 48 states, are not engaged in interstate commerce. The Code of Ethics of the National Association is a general code for the entire country. Only in the District of Columbia could the Appellant claim that the sale of real property was a business which could be subject to the Sherman Act.[2] This case is, therefore, far removed factually from the *Associated Press* situation.

The Code of Ethics of the National Association is exactly what its name implies, a guide for professional conduct of a high type, just as are the Canon of Ethics of the American Bar Association. Be it remembered that this Code of Ethics (Ex. 6, R. 481-486) was written in 1924, several

[2] In fact, what this argument amounts to is that Article 9 of the Code of Ethics does not contain the words "except in the District of Columbia."

years before the Washington Board became a member of the National Association (R. 224). It was written at a time when real estate brokers were indulging in many sharp practices. For example, they were representing both vendor and vendee and charging commissions from both without the knowledge of either (R. 218). This was even true in the District of Columbia and considered ethical practice until the decisions of *Forrest* v. *Wardman*, 40 App. D. C. 520 (1913) and *Dahlgren* v. *Story*, 39 App. D. C. 29 (1912). Brokers were taking net listings and options on their clients' properties (R. 218) and making exorbitant profits by these fraudulent means. Decisions in the appellate courts of all the states of the Union show the trickery and fraud of real estate brokers in this period.

To remedy these evils a committee of real estate men and a college professor specializing in real property wrote the National Code of Ethics for the then some 10,000 brokers and real estate boards in various states of the Union, at that time not including the District of Columbia. Only a reading of this Code of Ethics in this setting can make clear its purposes. It endeavored to put the real estate brokerage business upon an ethically professional basis. In this code the brokers set forth a charter of idealism (R. 224). It is an instrument to be commended rather than condemned. If complied with by brokers, this code will raise their occupation from one of criticism and suspicion to one of commendation and integrity.

The record makes this clear. There is evidence that a member of the Washington Board "tried to observe them all [the articles of the Code of Ethics] because they referred to decent, honest conduct in your relation to customers, in relation to the public and in relation to your fellow brokers" (R. 282-283). There is other evidence that the Code of Ethics was designed to remedy abuses which developed in the real estate profession during the depression years such

as the "free lot racket" (R. 214) and that Article 9 of the Code of Ethics was specifically designed as an attempt to remedy the abuses of dealing in options and net listings (R. 218).

Why then was NAREB indicted and complained against because of this code? Why is Article 9 of this code anathema to the Government? It reads as follows (Ex. 6, R. 483):

> "The schedules of fees established by the various real estate boards are believed *to represent fair compensation* for services rendered in their communities and *should* be observed by every Realtor." (Emphasis supplied)

In view of the existing evils among real estate brokers this was sound advice. In other words, brokers were told by this article not to overcharge for their services, not to resort to devious practices to acquire out of a real estate transaction something more than fair compensation. They were told not to get hidden profits at the expense of their clients.

To single out Article 9 of this entire Code of Ethics, to disregard the remaining 34 articles, to omit any consideration of its preamble and its purpose and to strain for interpretations is to indulge in legal myopia. This Code of Ethics is divided into sections on professional relations which deal with the relationship of one real estate broker to another. In the section on "Relations to Clients" the very highest principles of integrity and fair dealing are encouraged. In the sections dealing with the relations to the public the very highest standards of public service are recommended. In Article 9 is found the suggestion as to fairness in compensation.

The preamble of the Code of Ethics of NAREB compares favorably with the preamble to the canons of professional ethics of the American Bar Association. Honesty and integrity and fair dealing are the watchwords of both. The

lawyers' canons of ethics impose similar duties and obligations upon the lawyer in his relation to the public, to his fellow practitioner and to his client as does NAREB'S Code of Ethics upon its members.

The canons of ethics dealing with fees of the lawyer, numbers 12 and 13, are comparable to Article 9 of NAREB'S Code. Canon 12 in part says:

> "In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a *schedule of minimum fees adopted by a Bar Association*, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fees." (Emphasis supplied.)

Again in Canon 13, we find:

> "A contract for a contingent fee where sanctioned by law should be reasonable under all the circumstances of the case."

Is there much difference between a "schedule of minimum fees adopted by a Bar Association" and a "schedule of fees established by the various real estate boards?" Is there too much difference between "fair compensation for services rendered in their communities" and a "fee . . . reasonable under all the circumstances of the case?" Is there too much difference between the schedule of reasonable compensation that "should be observed by every realtor" and the lawyer's contingent fee that "should be reasonable?"

Can anyone reasonably say that the words of the realtors' code or the words of the canons of ethics are to have different construction in intent, motive and design when in both instances they are intended to set up a standard of ethical performance? We urge the same credit for sincerity in ethical thinking and practice to the realtor that the lawyer gives to his own profession.

In the interpretation of the intent, motive and design and the meaning of the words in Article 9 of the Code of Ethics, it must be remembered that this code now applies to more than 40,000 real estate brokers in the United States and more than 1,000 real estate boards in every state in the Union. In the District of Columbia there is one board and there are only about 250 members in that board engaged in real estate activity in the District of Columbia (R. 30), while there are more than 3,000 persons licensed for real estate activity in the District of Columbia (R. 296). While it is true that the members of the Washington Real Estate Board perform a considerable volume of real estate services it must be remembered that more than 3,000 others who are non-members do likewise. How then can it be said that the mere ethical suggestion of fair compensation to NAREB'S own members in the District of Columbia can be such a substantial conspiracy as to restrain commerce in the sale, leasing and exchange of real estate in the District of Columbia? There is not the slightest evidence that anything that NAREB, or for that matter the Washington Board, has done has made the slightest impact on the real estate economy of the District of Columbia.

It is essential to the Appellant's syllogism that the word "should" in Article 9 of the Code of Ethics be construed as "must", so as to make the Code of Ethics mandatory. Otherwise it would be no violation of the by-laws not to follow Article 9 and the entire argument of the Government would collapse. One definition of the word "should" in Webster's New International Dictionary (2d Ed.), cited by Appellant, is:

> "3. *Should*, esp. when stressed, is also used to express moral obligation; as, you *should* be sorry. . . . Syn.—See OUGHT." *Id.* 2322.

It could not have been clearly erroneous for the trial court to construe Article 9 upon its face as merely advisory since

the most that Appellant could contend is that Article 9 is ambiguous and might be intended as mandatory.

There is in addition, evidence in the record to indicate that Article 9 has been considered and construed by those who promulgated and used it as merely advisory. Such was the testimony of Mr. Buchanan (R. 282), Mr. Nelson (R. 219), and Mr. Rush (R. 131-2). This non-mandatory interpretation of Article 9 is also borne out by evidence in the record that the National Association has never attempted to enforce Article 9 of the Code of Ethics with respect to the Washington Board (R. 102-103, 144, 225).

The greatest weakness of the syllogism urged by the Appellant, is that no one else had apparently thought of its intricate logic prior to this suit. This fact is illustrated by the following testimony of Mr. Beitzell of the Washington Board (R. 267-268):

> "Q. And you saw in the constitution of the National the provision that you were supposed to live by and abide by and conduct your affairs as a realtor in accordance with the constitution and with those ethics, isn't that true?
>
> "A. That is right.
>
> "Q. And those ethics pretty well cover your professional conduct as a realtor in dealing with the public?
>
> "A. That is right.
>
> "Q. Isn't that true?
>
> "A. Yes.
>
> "Q. What wasn't brought to your attention was this: Because that constitution contains a provision that you should abide by the ethics of the National, and because the National had a provision in its ethics, one out of about forty, to the effect that the commissions which had been established by the local Boards were considered fair and reasonable and you ought to adhere to them, now in view of the fact that those provisions are in there, let me ask you this question:
>
> "Did you ever consider that you were so bound by the ethics of the National Association that you had to ad

here to what was called a standard fee which had been established by your own local board so that you couldn't negotiate your own commission?

"A. No, sir. I do not.

"Q. And have you ever heard that, among the members of your own local, or among the members of the National Association, interpreted that way?

"A. Never." (R. 267-268.)

Considering all the evidence in the record, with respect to Article 9 of the Code of Ethics of the National Association, Appellant cannot establish the contention which it must make that Finding of Fact No. 20 (R. 434) is clearly erroneous.

NAREB'S Committee on Rates, Rules and Customs and Its Guide

The Government argues that it is entitled to judgment against NAREB because of the existence of a Committee, and the publication of a Guide, on Rates, Rules and Customs. Its brief on page 40 states:

> "If further evidence be needed, it is to be found in the activities of the National Association in preparing and distributing its 'Guide on Rates, Rules and Customs'."

The complaint charges NAREB with being engaged in a conspiracy "to restrain the trade and commerce of the District of Columbia in the sale . . . . of real property and the improvements thereon" (Par. 11, R. 367). The complaint charges that the means of accomplishing the restraint of trade as aforesaid was the establishment of a Committee on Rates, Rules and Customs, the *purpose* of which was to *raise brokerage commission rates and achieve uniformity in said rates throughout the United States including the District of Columbia* (Par. 14, R. 367). It further

charges that in accordance with the recommendation of the National Association, the Washington Board increased the rates established in its schedule of commission.

In a section of the Appellant's statement of the case (Appellant's Brief, pp. 15-22) Appellant set forth the evidence in the record which it claims would support a finding that these Appellees conspired with the Washington Board. That evidence, it is apparent from a cursory reading, is entirely circumstantial. Since the trial court found that there was no conspiracy between NAREB and the other Appellees this circumstantial evidence can hardly be urged as grounds for holding at the trial court's Finding of Fact No. 20 (R. 434) is clearly erroneous. This is doubly true when the evidence relied upon by Appellant is viewed in its full context and with respect to other evidence in the record upon the same subject.

First, Appellant points to paragraph 14 of the answer of the National Association (R. 375), as an admission that committees of the National Association had taken an active part in the formulation of *standards* of compensation through the activities of various committees on rates, rules and customs. As will be discussed later the formulation of definitions and standards upon which the duties of a realtor in his various activities may be accurately classified and determined is a far cry from the fixing of rates of commission in the District of Columbia. A reading of the rest of paragraph 14 indicates this to be the case. In that paragraph is the statement (R. 375), "it was the effort of the National Association to suggest *standards* of compensation for the various services performed by real estate brokers that were regarded as reasonable in order to prevent unfair practices, imposition, unfair dealing and fraud upon the buying, selling and investing public and to so inform the public so that it would have some knowledge of what seemed

to be fair *standards* of compensation to brokers for services performed with respect to real estate." (Emphasis supplied.) Thus, paragraph 14 is not evidence circumstantial or otherwise that the National Association conspired with the Washington Board and its members *to fix rates*.

Definitions of the various types of real estate broker services were far from uniform throughout the United States. The National Association was aware that large lending agencies, such as insurance companies, and including Federal Government agencies such as the Home Owner's Loan Corporation, had complained of these differences and the resultant confusions (R. 211-213). It was the purpose of the Committee on Rates, Rules and Customs of NAREB to bring some order out of this confusion of definitions (R. 213).

The extract from Government's Exhibit 38 (R. 584), a letter written in 1935 which is quoted on page 16 of Appellant's brief is consistent with a purpose to formulate standards and definitions alone. Appellant might also have referred, to show the purpose of the Committee; to another letter written by the same author during the same year which Appellant offered in evidence as its Exhibit 29 (R. 583-584). This indicates that the National Association was interested in uniformity of classification and standards rather than uniformity of the fee itself (R. 583). In that letter the following analogy was drawn (R. 584):

> "I believe one of the best things the American Institute of Architects ever did was to develop a uniform contract of employment setting forth what an architect is supposed to do, describing his responsibilities briefly and establishing the basis of his charges. While the architect is free to vary the percentages and charges in a given case, he uses the same standard uniform contract. The fact that there is a standard contract used throughout the country and the basis of fee established eliminates an endless amount of difficulties and troubles

which I am told they were subjected to years ago. It seems to me this case is very much in point with respect to our own problems."

Counsel for Appellant also offered in evidence (R. 163) an excerpt from its Exhibit 31 (R. 585-587) as follows:

> "In an effort to bring about more uniformity in *language, style, and basis of calculation* in Realtors' charges, this Committee was formed during the year under the Chairmanship of Robert R. Otis of Atlanta. This is a long-time effort but one which may yield us important results." (Emphasis supplied.)

Returning to Government Exhibit 30 (R. 584) it might be pointed out that that letter was to Mr. Luchs as a member of the National Association and of one of its committees, rather than as a representative of the Washington Board. The closing paragraph of that exhibit, immediately following the portion quoted by Appellant, states (R. 584-585):

> "I have heard from your Board of your experience in this matter in Washington and you have been recommended for appointment on this Committee. I hope that you will be willing to serve. Upon receipt of your acceptance of this appointment, we will keep you in touch with any developments of the Committee and the accountants who are working with Mr. Otis in this matter."

Let it always be remembered that prior to this date the Washington Board already had a schedule of rates of commissions. See the Complaint, par. 25 (R. 369-370) and testimony of Mr. Rush (R. 50-51). It is obvious that the National Association was attempting to profit by Mr. Luchs' experience in Washington, D. C. This is not evidence that it was attempting to encourage or incite the Washington Board or its members to do anything. There would be nothing illegal in any event in trying to

emulate the Washington Board since there is no question as to the legality of schedules of commission within the boundaries of the 48 states, wherein almost all the member boards of the National Association are located, since selling real property is not interstate commerce.

Moreover, a reading of the entire Government's Exhibit 30 (R. 584) also indicates that it is not a report of actual past occurrences but a suggestion of what *might* be done in the future. It is weak circumstantial evidence at best. The probative value of Exhibit 30 is further weakened by the fact that it was written almost eight years before the adoption by the Washington Board on February 16, 1943 of a new schedule of rates, Complaint, par. 21 (R. 369).

However, as corroborative evidence, Appellant relies upon a letter from the same author written in 1946 which was offered in evidence as Government's Exhibit 48 (R. 617-618). The paragraph quoted on page 16 of Appellant's brief is completely out of context, as is indicated by an earlier paragraph in the same letter which read (R. 617):

> "The task of this Committtee is to seek to bring increasing order out of the somewhat confused rules of our Member Boards with reference to fees, commissions, and charges for services. This can be done by seeking *uniformity in definitions and the basis of charges without in any way seeking to suggest the actual amount of the charge.*" (Emphasis supplied).

In addition, with respect to the portion of Exhibit 48 (R. 618) quoted by the Government, it should be pointed out that the suggestion of member boards acting together to gain confidence and strength was made to a Mr. A. R. Saunders in Lansing, Michigan. The letter was not sent to the Washington Board (R. 220-221), and there is absolutely no evidence that such a suggestion was ever made to the Washington Board, or a member thereof.

The documentary evidence that the purpose of the Committee on Rates, Rules and Customs was not to fix fees but to standardize definitions is supported by the verbal testimony of Mr. Baker who was asked by Government Counsel as to his knowledge of the purposes of the Committee and who replied that its purpose was to deal with ethics and arbitration (R. 146). Upon further inquiry into the purpose of the Committee in drafting a Guide on Rates, Rules and Customs for distribution to member boards, Mr. Nelson testified (R. 233-234):

"By Mr. Kramer:

"Q. Now, Mr. Nelson, you testified that this Guide, Exhibit No. 47-A, was for the purpose of obtaining uniformity in the basis of charges. Isn't that your point, rather than an identity of charges?

"A. Uniformity of definitions so that people are talking about the same thing, so that an owner and a broker are talking about the same thing.

"Q. You say in Exhibit 48, the second paragraph, the last sentence:

'This can be done by seeking uniformity in definitions and the basis of charges without in any way seeking to suggest the actual amount of charge.'

"A. Yes. May I explain the word 'basis'?

"Q. I wish you would.

"A. Take in appraising, for instance, there has long been a conflict on what the basis of the charge should be.

In some cases appraisers have said it should be a percentage of the valuation.

The best practice today, so far as I know, is not to make the appraisal fee contingent upon the valuation in any way, but rather to base the fee on the time employed and on the rating which a man puts on his own skill and what he is willing to work for.

So there you have a conflict on what we call the basis of what the charge should be.

You still find some appraisers who will appraise the property on a certain fixed percentage of the valuation.

Well, you have the same problem, I suppose, in law, and in many other businesses, that conflict, whether it should be contingent fee or whether it should be a fair fee based on competency and time employed. That is what I meant by 'basis.'

"Q. And the purpose in sending out the Guide, you say, is not to seek to affect the amount of fees, is that it?

"A. That is right. May I qualify that by saying that our function is informational and educational, and we want to make available to each board all of the information from a thousand real estate boards throughout the country, so that they may know what good practices and what different practices are.

We function like almost any other educational sort of institution. You can't say that all of the material issued by a college has no effect. It may have some effect, but its primary purpose is to let people know what the facts are."

The evidence, therefore, falls far short of indicating that the purpose of the Committee was to fix rates, fees or charges in the District of Columbia. On the other hand there is ample evidence in the record that the purpose, design, motive and intent of the National Association's Committee on Rates, Rules and Customs was to standardize basic definitions with respect to the services rendered by Realtors, in order to eliminate unethical practices and abuses in the industry. See *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933). This Court will not permit a trial *de novo* on appeal with respect to such elements in an anti-trust case. *United States* v. *Yellow Cab Company*, 92 L. Ed. (Adv.) 123 (U. S. 1949).

Intent and purpose aside, however, Appellant urges (Br. pp. 18-20), as its final piece of evidence, that the National

Association sent a "Guide" on commission rates, rules and customs (Ex. 17-A, R. 545) to the Washington Board, and that this Guide was the cause of the change by the Washington Board of its schedule of commission rates in 1943 (Ex. 28, R. 578) and in 1944 (Ex. 25, R. 569). Appellant stresses circumstantial evidence that on two occasions in 1939, which was about four years before the schedules were changed, the Washington Board deferred action of a special "Commission Study Committee" of the local Board until recommendations of the National Association were received (Ex. 12, R. 518-519; Ex. 27, 577-578).

With respect to Exhibit 12 (R. 518-519) the non-quoted portion of the first sentence which Appellant sets forth at page 17 of its brief indicates that the only interest of the Washington Board in the National Guide which was to be issued was with respect to *classification* of services. The entire text of that sentence is (R. 519) "The various *types of services* rendered by members for which no fees have been established by the Board was also discussed and the suggestion made that in view of the fact that the National Committee had appointed a special committee on commission rates and rules a copy of its report might be obtained for the consideration of the Committee." (Emphasis supplied). It is apparent that the Washington Board wanted the National Guide in order to assist it in defining these types of services.

This is also indicated by the paragraph in Exhibit 27 (the other local Board minute relied upon) which stated (R. 577):

> "It was brought out during the discussion that the resolutions of the National Committee would only be in the shape of a guide and not an attempt to force the adoption of a nation-wide commission schedule."

Both of these Committee minutes moreover are but circumstantial evidence that the Washington Board's Committee did wait until they received the Guide from the National Association before drafting a changed schedule for the Washington Board. This was about four years before such a changed schedule was adopted, it must be remembered. There is, moreover, evidence in the record that the Washington Study Committee did not wait for the Guide from the National Association. Mr. Rush, secretary of the local board, testified as follows (R. 127):

> "The COURT: You or the Board, however, waited, as a matter of fact, before adopting the 5 percent on the first $50,000 until such time as you heard from the National Association in reference to this matter. That is a fact, isn't it?
>
> "The WITNESS: No, we never considered this. At one of the meetings that was held it was stated that this matter should be held up but, you see, your Honor, each year half of my board of directors change and all the officers and all new committees. Unless I dig out the Committee action of last year and put it over into the jacket for the pending year or the coming year's business, while we don't refer back to those things and I have no knowledge of us having referred back to this report."

When the Guide actually arrived the evidence is that it was not considered by the Washington Board. Mr. Rush stated (R. 125-126):

> "The COURT: Mr. Rush, is the only communication received by the Washington Real Estate Board from the National Association of Real Estate Boards in reference to a guide on rates, rules and customs and particularly directing your attention to rates, was that the only information received by you that it ought to be 5 percent on the first $100,000?
>
> "The WITNESS: Your Honor, I received that guide.
>
> "The COURT: This is prior now to the time you had

your meeting at which you approved the report of the committee adopting 5 percent on the first $50,000. In this communication that you received from the National Association of Real Estate Boards, my recollection was that they had suggested 5 percent on the first $100,000 and I am trying to find out if that was the only suggestion or report that you received in reference to that matter from the National Association.

"The WITNESS: I received two copies, according to Mr. Barnard's letter. What I did with them, sir, I can't recall because, after all, we already had our 5 percent overall for the District of Columbia and what the NATIONAL guide said——

"The COURT: What I am trying to find out is——

"Mr. WHITEFORD (Interposing:) That is on page 9, your Honor.

"The COURT: Page 9?

"Mr. WHITEFORD: Yes, at the top of the page.

"The COURT: It says here, 'all commissions shall be based on total values or sale prices of property and not on equities or partial payments. Commissions on the sale of improved or vacant property shall be not less than 5 percent on the first $100,000'.

Yours was 5 percent on the first $50,000?

"The WITNESS: Yes, sir.

"The COURT: So that the local Washington Board did not accept the suggestion made by the National Association of placing 5 percent on the first $100,00 ?

"The WITNESS: I doubt that they even considered it, sir. I don't recall that they considered it in any respect."

As evidence that the Guide was considered by the Washington Board the Appellant urges (Br. p. 20) that "the recommendations contained in the Guide and the changes adopted by the Washington Board in 1943, and in 1944, contain striking similarities." However, when Appellant attempts to point out these similarities (see its footnote 10 beginning on page 20) it can only find similarities in the

1944 language (Ex. 25, R. 569-574). It is very significant that this language is not contained in the 1943 revision (Ex. 28, R. 578-582) since it was prior to 1943 that the Appellant would have had the trial court believe the Washington Board's study committee waited for advice from the National Association. The absence of such similar language raises an inference that the study committee did not consider the National Guide prior to the 1943 revision. It was in 1943 that the boundary line was eliminated and the old rates were replaced. (Ex. 43, R. opposite 521; R. 71). The basic *rates* did not change appreciably in 1944, but merely some definitions of the basis for rates. It is, therefore, obvious that the NAREB Guide had no effect upon the Washington Board's "fixing" of rates.

Such similarity in *language* between the Guide and the 1944 schedule is not surprising. In a profession, or trade, technical definitions often become accepted throughout an industry. Moreover, this is not what the complaint charges. It charges a conspiracy to fix rates, the Appellant contends (Br. p. 3).

Appellant does claim (Br. p. 20) that the sample rates in the Guide and the new Washington Board rates were strikingly similar. The very example Appellant gives, *NAREB:* 5% on 1st $100,000, 3% on next $400,000 and 2% on the balance, as compared to, *Washington Board:* 5% on 1st $50,000 and 3% on balance, speaks for itself! Similar differences in rates between the Guide (Ex. 17-A, R. 537) and the 1943 and 1944 local schedules (Ex. 28, R. 578; Ex. 25, R. 569) abound.

With respect to leasing, for example, the Guide "suggests" 5% for first five years, 3% for next five years and 2% beyond (R. 540), while the 1943 Washington schedule adopted 2½% for first 21 years, 1% for next 21 years, ½% for next 21 years and ¼% for any period beyond for long

term business leases, adopted 5% for first year, and 2½% up to 21 years for shorter business leases (R. 579) and adopted for residential leases 5% for first year and 2½% thereafter (R. 580). The 1944 Washington schedule for long term leases remained unchanged from 1943 except to adopt 5% for first year (R. 570) while shorter business leases remained the same (R. 570-571), as did residential leases (R. 572). Similar examples of dissimilarity with respect to other types of services appear throughout. Any minor similarities are coincidental. The "striking similarity" which Appellant urges (Br. p. 20) fails to survive a comparative examination of the three documents.

Anticipating such a discovery, in fact, Appellant urges two decisions of this Court in support of the proposition that, "A combination which delegates to one of its members the power to fix a price *that all members agree to observe* is just as illegal as a combination that contemplates that all members will participate directly in the selection of particular prices." (Emphasis supplied.) The proposition, if established, would avail Appellant naught, inasmuch as Appellees National Association and Herbert U. Nelson never agreed to observe such "price", if compensation for personal service can be called a price. The two decisions cited, *United States v. Line Material Co.*, 333 U. S. 287 (1948) and *United States v. Masonite Corp.*, 316 U. S. 265 (1942) involved industrial combinations in which *all* parties either agreed to sell at the fixed price or agreed to allow others to sell their products at a fixed price. In the instant situation Appellees National Association and Herbert U. Nelson have never agreed to do anything. Moreover, they are not even competitors of the Washington Board or its members. They do not sell real estate anywhere, in fact.

It must be remembered that prior to February 16, 1943 there was a schedule of commissions in force with respect

to the Washington Board, Complaint par. 19, 20, 23 (R. 368-369), which was in effect at least as early as 1934 (R. 50-51) or 1931, Complaint par. 25 (R. 369), and apparently much earlier (R. 48, 50). It is clear also that the only effect which the National Guide had upon the Washington schedules was, perhaps, to suggest some wording concerning definitions in the 1944 version.

This is an outstanding weakness of the Government's case with respect to NAREB. The Government doubtless contends that it was illegal for the Washington Board to have a schedule of commissions in 1931 or 1934. The Guide sent by the National Association in 1941, ten years later, could have had no bearing on the initial decision of the Washington Board to have a schedule of commissions, whenever that occurred. A comparison of the sample schedule of commissions in the National Guide and the 1943 and 1944 Washington schedules proves conclusively that the National Association's Guide could have had no effect on the local board's decision as to the amount of the new commissions.[3] There is therefore, nothing to tie the National Association or Herbert U. Nelson into any conspiracy to fix rates in the District of Columbia. The Government's case with respect to NAREB falls of its own weight, regardless of whether the Washington Board violated the Sherman Act.[4]

CONCLUSION

An examination of the evidence in this case has indicated that there is ample evidence to support the trial court's Finding of Fact No. 20 (R. 434) and to establish that it is not

[3] This is further indicated by the testimony of Mr. Beitzell, an eye witness participant in the 1943 meeting, that the members of the Washington Board decided on the actual rate at an open meeting (R. 255) NAREB knew nothing of this vote (R. 225).

[4] In all seriousness, it may be questioned whether there would have been an appeal taken in this case were Appellees National Association of Real Estate Boards and Herbert U. Nelson the only defendants below.

clearly erroneous. In fact, the evidence indicates that the Government has failed to adduce any reliable evidence that the National Association of Real Estate Boards and Herbert U. Nelson, on the one hand, conspired with the Washington Real Estate Board and its members on the other, to fix and prescribe the rates of commission to be charged by members of the Washington Real Estate Board or to raise rates of commission in the District of Columbia. What evidence the Appellant urges is highly speculative and circumstantial, and is discredited by other evidence in the record. There is an absolute lack of any evidence, circumstantial or otherwise, in the record to prove that these Appellees conspired with anyone to restrain "the trade and commerce of the District of Columbia in the sale, exchange, lease and management of real property and the improvements thereon", which is actually the charge in the complaint. Complaint pars. 8, 9, 10, 11 (R. 366-367).

It is submitted that Finding of Fact No. 20 (R. 434) is supported by the evidence and is not clearly erroneous, and that on the basis of such finding the judgment below must be affirmed with respect to Appellees National Association of Real Estate Boards and Herbert U. Nelson, regardless of the disposition of this appeal with respect to the other Appellees.

Respectfully submitted,

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